

Legal Theology: Law, Modernity and the Sacred

Peter Fitzpatrick[†]

I. INTRODUCTION

With some alarm I noticed when working on this talk that I had used exactly the same sub-title in a piece published in this country.¹ Not that I expect this piece to be permanently on your bedside tables, but for form's sake allow me to say that this present performance is markedly different from that published one. That oversight does helpfully suggest a new academic genre: a different paper with the same title rather than the more usual academic variant of the same paper with different titles.

That latter thought is not entirely gratuitous, since my guiding theme will revolve around things supposedly different being the same and things supposedly the same being different. Of course, the epochal difference that must concern me here is that between the religious and the secular. It is still the predominant view that the two are intrinsically opposed. An enlightened or modernist secularism comes to relegate religion definitively to realms of the private, the residual, and the atavistic.² Or religious belief is revealed as a projection of a definitive reality of this

[†] Anniversary Professor of Law, Birkbeck, University of London. This paper is a revised version of the keynote address offered to the Symposium *Pluralism, Religion & the Law* held at the Seattle University School of Law on March 7, 2008. My thanks to many of the symposiasts for invaluable comments; to Russell Powell for the generous invitation to give the talk; to Tayyab Mahmud for unsurpassed hospitality; and to Maria Carolina Olarte Olarte and Richard Joyce for crucial references and translations.

1. Peter Fitzpatrick, *The Triumph of a Departed World: Law, Modernity, and the Sacred*, in *LAW AND THE SACRED* (Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey eds., 2007). The title proper "Legal Theology" deliberately resonates with CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY*, (George Schwab trans., The Univ. of Chicago Press 2005) (1922), especially chapter 3. If anyone were so inclined, this present paper can be read as a response to the two linked failures of *POLITICAL THEOLOGY*. One failure is the difficulty involved in creating something, the sovereign, in terms of what it creates, the decision on the exception. The other difficulty is Schmitt's inability to resolve the conundrum of the sovereign's generating a legal order that somehow exists and persists apart from the sovereign.

2. *E.g.*, MARCEL GAUCHET, *THE DISENCHANTMENT OF THE WORLD: A POLITICAL HISTORY OF RELIGION* (Oscar Burge trans., Princeton Univ. Press 1997) (1985).

world.³ Yet we have of late a plethora of books, academic and popular, making out a revisionist, even a revanchist case. Often, but not always, prompted by the exaggerated perception of a religious revival, these tomes find that the very secular quality of modern political formation, or some variety of it, is derived from and sustained by the religious.⁴ This, to be a little more specific, is an occidental modernity and the religion invoked is Christianity. There is, however, an obvious problem here. If the religious and the secular are the same, what is to stop their fusing indistinguishably with each other? There seems to be (also) some difference to be observed. The revisionist premise itself confirms difference for it is set against the continued affirmation of a divide between the secular and the religious, even if it can find that divide to be phantasmal.

I will later have some regard for the phantasm, but for now allow me to indicate more pointedly what this talk will be about. The argument overall will be that with the supposedly modern Occident there is both sameness *and* difference as between the secular and the religious, and that law, modern law, is constitutively enmeshed within this sameness and difference. That combination of sameness and difference, along with the integral part of law, is traced in a cumulation of three historicities, the first being the creation of the world's imperium, of the modern world-system, in the sixteenth century. Then, with the second historicity we have the time of revolutions, seen here as almost revolutions, of the seventeenth and eighteenth centuries. And finally, with the third historicity we have the time of high modernism and the death of God in the nineteenth and twentieth centuries. Each of these three phases is captured, as it were, in the work of a corresponding thinker who is taken to be a telling instance: Vitoria, Hobbes, Nietzsche. All of that is then briefly brought into what could precariously be called the present and in a way that reveals the exercise to have been all along a history of the present.

Before embarking on that modest agenda, allow me to say something about the "history" drawn on here, this history of the present. The

3. *E.g.*, LUDWIG FEUERBACH, *THE ESSENCE OF CHRISTIANITY* (George Eliot trans., Prometheus Books 1989) (1841); SIGMUND FREUD, *TOTEM AND TABOO* ch. 4 (James Strachey trans., London, Routledge & Kegan Paul 1960) (1913). Much of the orientation of this present paper is captured in Marx's aperçu: "We do not turn secular questions into theological questions, we turn theological questions into secular questions." KARL MARX, *On the Jewish Question*, in *EARLY WRITINGS* 211, 217 (Rodney Livingstone & Gregor Benton trans., Penguin Books 1992) (1843).

4. For an engaging and influential instance, see JOHN GRAY, *BLACK MASS: APOCALYPTIC RELIGION AND THE DEATH OF UTOPIA* (Allen Lane 2007). For an empathic and formidable instance see, CHARLES TAYLOR, *A SECULAR AGE* (The Belknap Press of Harvard Univ. Press 2007). And for something of the possible diversity of nuance, see Charles Barbour's paper in this Symposium Issue, *Separated Unto the Gospel of God: Political Theology in Badiou and Agamben*, 32 SEATTLE U. L. REV. 279 (2009); and also *POLITICAL THEOLOGIES: PUBLIC RELIGIONS IN A POST-SECULAR WORLD* (Hent de Vries and Lawrence E. Sullivan eds., Fordham Univ. Press 2006).

phrase is associated with Foucault, and some of Foucault's meaning will be brought in.⁵ For present purposes, a history of the present can perhaps be most sharply delineated by saying what it is not. It is not, to borrow Foucault's account of Nietzschean history, "a history whose function is to compose the finally reduced diversity of time into a totality fully closed upon itself."⁶ Put another way, it is not the more typical occidental historiography of the progressivist's grand narrative. Such historiography, in Ricoeur's terms, "consists in elevating as an absolute this historical present established as an observation point, even a tribunal, for all the formations . . . that have preceded it."⁷ The instance that juts out in the present setting is the tale of secularism's graded triumph over a diminishing force of the religious. In stark contrast, the history of the present resorted to here would seek to put the present in question, to reveal a dissonance in it, and thence to account for that dissonance in affines of the religious. That accounting cannot be a resolved completion within a present that is always irresolvable. Rather, what it reveals, or attempts to reveal, is a persistent incompleteness in and as the present. Such revelation involves, in turn, a bringing forth of what had to be forgotten so as to affirm the putative completion that is, for example, the triumph of a modernist secularism. This is a forgetting that, in Nietzsche's terms now, is an "active forgetfulness": "Forgetfulness is no mere *vis inertiae* [force of inertia] as the superficial believe; it is rather an active—in the strictest sense, positive—inhibiting capacity."⁸ This forgetting is continuous with, and constituent of, what is remembered.

If, then, the purported effect, the realized culmination, of a grand narrative cannot be claimed for this history of the present, what "force" does it have? That force is one, borrowing the term from Keats, of a

5. See Michael S. Roth, *History of the Present*, 20 *HIST. & THEORY* 32 (1981).

6. MICHEL FOUCAULT, *Nietzsche, Genealogy, History*, in *LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS* 139, 152 (Donald F. Bouchard & Sherry Simon trans., Cornell Univ. Press 1997) (1971).

7. PAUL RICOEUR, *MEMORY, HISTORY, FORGETTING* 305 (Kathleen Blamey & David Pellauer trans., The University of Chicago Press 2004) (2000).

8. FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALS* 39 (Douglas Smith trans., Oxford Univ. Press 1996) (1887) (Second Essay, § 1). Nietzsche is writing here of individual psychology, but he proceeds to merge this dynamic into what could be called social or historical memory, fusing that into an anthropology of law that we will come to later. For Freud in a like vein, complete with an apt reference to Nietzsche, see SIGMUND FREUD, *THE PSYCHOPATHOLOGY OF EVERYDAY LIFE* 140, 152 n.5 (Anthea Bell trans., Penguin Books 2002) (1901). For forgetfulness in the constitution of law, see Joan Dayan, *Held in the Body of the State: Prisons and the Law*, in *HISTORY, MEMORY, AND THE LAW* 183 (Austin Sarat & Thomas R. Kearns eds., The Univ. of Mich. Press 1999). And for "collective" memory as "selected," see MAURICE HALBWACHS, *ON COLLECTIVE MEMORY* (Lewis A. Coser trans., The Univ. of Chicago Press 1992) (1925).

“negative capability.”⁹ Bluntly, if any of the three historicities with which I will engage had not been, then the present would not be as it is. (Also, and here there will be a touch of narrative, it may be that each of the three historicities could not have been without the one or the ones coming before it.) A present so derived cannot provide a carapace keeping out other historical engagements with law and religion. Instead, and like Keats’s negative capability, this history of the present must remain open and receptive.

II. IMPERIUM

My first ethos-bearing author is Francisco de Vitoria, whose teachings provide an occidental template accommodating both modern imperialism and modern political formation. And whilst this template is a religious one, it is one that Vitoria renders capable of taking effect, and of taking on affect, in the world—if not, in its terms, entirely of the world. He does this, aptly enough, as an apologist for Spain’s imperial expansion into the Americas. With this expansion, Spain provided the enduring model of modern imperialism and, in conjunction with Portugal, generated the operative ability to conceive of the world entire. Vitoria’s contribution to the process was set against the more resolutely genocidal of the Spanish colonists and, in his *De Indis*, he drew on Aquinas and the *ius gentium* to find, broadly, that the Indians, so-called, were human and possessed of reason and hence entitled to a commensurate regard. This did not prevent Vitoria’s providing a refined justification for their colonial subordination, however—a justification itself derived from the *ius gentium*.¹⁰

Vitoria projects that resolution onto a wider world in which the tractable *ius gentium*, whilst extending to all people, is yet realised or fully realised only by some, by a marginally flexible range of Christian and civilized nations. Here, Vitoria adroitly adapted two types of *ius gentium* in Roman law. One was the law common to, or shared by, all civilized peoples. The other was the *ius inter gentes*, the law governing relations between peoples and latterly international law. Vitoria even provided an apt accompanying lineament of nation, the “perfect community” that is “complete in itself.”¹¹ More on that shortly.

9. Letter from John Keats to George and Thomas Keats on Keats’s Negative Capability (Dec. 21, 1817), available at <http://www.mrbauld.com/negcap.html>.

10. There is now a superb and readily available collection and translation of the works of Vitoria of particular relevance here, or of key extracts from them: FRANCISCO DE VITORIA, *POLITICAL WRITINGS* (Anthony Pagden & Jeremy Lawrance eds., Jeremy Lawrance trans., Cambridge Univ. Press 1991).

11. VITORIA, *On the Law of War*, in *POLITICAL WRITINGS*, *supra* note 10, at 301.

Before coming to the constitution of that national community, there has to be a putting in place of an epochal shift marked by Vitoria, a shift that provides the divine source of this constitution—provides what could be called the hidden constitution: “[t]he real constitution,” pronounced Heraclitus, “is accustomed to hide itself.”¹² The bestowing god here was, in Vitoria’s Thomistic terms, a god who was the source of law, of natural law or the law of nature: “[T]he rules of law are in God *as in a thing which is to rule*.”¹³ That natural law has to be understood in a way infinitely more extensive than the constrained meaning that “law” often came to take on later. Borrowing from Pagden and Lawrance: “For Vitoria, as for Aquinas, the law of nature was the efficient cause which underpinned man’s relationship with the world about him and governed every practice within human society.”¹⁴ It was then possible from the perspective of “man” to know the rules of law that are in God as the thing which is to rule. This was a god amenable to Vitoria’s scholasticism, the god of perfect order, of constancy, caught by “his” own laws, by “nature,” much like the god later forbidden by Malebranche to “disturb the simplicity of his ways.”¹⁵

It has of course been an enduring issue with monotheism as to just how this bound god, this god caught by “his” own creation, could endure integrally with the perfectly unbound god of revelation, the god of miracle and nature confounded, the god quite beyond us. With Vitoria, as with Thomist scholasticism, earthly natural law was derived from divine law. And whilst divine law remained of the godhead and ever beyond any comprehension or even manifestation, God’s law for us had to be made “externally manifest.”¹⁶ Thomist doctrine ascribed a causal force to divine law in its effecting natural law: “God cannot destroy the effect of the formal cause as long as the latter exists.”¹⁷ One could then project the effect that is natural law back on to divine law and thence to God and, as it were, bind both divine law and the deity to that effect, to natural law. And so Vitoria would “think that God could not have made the fire, which is hot by nature, cold, or that it were not warm by nature; nor the snow black; the soil, light; nor could God destroy or change in gen-

12. G. S. KIRK, J. E. RAVEN, & M. SCHOFIELD, *THE PRESOCRATIC PHILOSOPHERS: A CRITICAL HISTORY WITH A SELECTION OF TEXTS* 192 (2d ed., Cambridge Univ. Press 1983) (1957).

13. VITORIA, *On Law*, in *POLITICAL WRITINGS*, *supra* note 10, at 163 (his emphasis).

14. Anthony Pagden & Jeremy Lawrance, *Introduction* to VITORIA, *POLITICAL WRITINGS*, *supra* note 10, at xv.

15. See PATRICK RILEY, *THE GENERAL WILL BEFORE ROUSSEAU, THE TRANSFORMATION OF THE DIVINE INTO THE CIVIL* 40 (Princeton Univ. Press 1986).

16. VITORIA, *On Law*, in *POLITICAL WRITINGS*, *supra* note 10, at 155.

17. FRANCISCO DE VITORIA, *On Homicide*, in *OBRAS DE FRANCISCO DE VITORIA: RELECCIONES TEOLÓGICAS* 1100 (Teófilo Urdániz trans., Editorial Católica, Biblioteca de Autores Cristianos 1960).

eral the natural propensities of things.”¹⁸ So, even if all this still left earthly natural law derivative of a transcendent divine law, access or attachment to that divine law was not necessary for either the integrity or the efficacy of natural law, or indeed for the ability to know it.¹⁹ It can be known comprehensively by human reason being brought to bear on nature.²⁰ Bluntly, a determinable natural law can exist without divine revelation, and it can exist even if the godhead did not. And that natural law could be rendered as an earthly *ius gentium*.

This profanation accompanied and enabled the subjection of religious power to the political, and this was a political increasingly concentrated in the diversity of kingdoms and principalities. The Catholic and universal cohesion of religious and political power, to the extent that it ever existed, was becoming increasingly attenuated. Hence we have the adventitious association of Vitoria with the Reformation. The erstwhile tying of kingdoms and principalities, these proto-nations, to the universal *ius gentium* is broken, and an ersatz Grotius provides now the “true” source of the *ius gentium*: the surpassing and singular nation. Such a nation can effect the impossibility of a complete, quasi-imperial control of the domain of its relation to others, including nations, the domain of the international and of international law. This meant, in Vattel’s stark formulation from the eighteenth century, that the society of nations was to have no overarching commonalty, and this to such a complete extent that none of its members “yield . . . rights to the general body,” each sovereign state being “independent of all the others.”²¹ Thence we have one forgetting of Vitoria, a forgetting effected in his jurisprudential relegation as an opaque and uncertain founder of what was a rather more resolute international law. But what will be central here is another forgetting of Vitoria, a forgetting postponed. What is forgotten, eventually, is the divine, and indeed imperial, origin of secular political authority in the Occident. For now, for Vitoria, political domination of the religious still subsists in a reference to a divine source of authority, a source on which

18. *Id.* at 1099.

19. VITORIA, *On Law*, in *POLITICAL WRITINGS*, *supra* note 10, at 164.

20. *Id.* at 155, 164.

21. EMER DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATIONAL LAW APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND SOVEREIGNS* 9 (C.G. Fenwick trans., Carnegie Inst. 1916) (1758). That standard perception of Vattel should be qualified by the refined engagement in GEORG CAVALLAR, *THE RIGHTS OF STRANGERS: THEORIES OF INTERNATIONAL HOSPITALITY, THE GLOBAL COMMUNITY, AND POLITICAL JUSTICE SINCE VITORIA* 306–17 (Ashgate Publ’g 2002). The broad lines of that qualification would have Vattel according substance to the international.

the political depends so as to combine, like the god of monotheism, its determinate existence with an unconstrained efficacy.²²

There is yet another combining which the godhead has to effect, one that will also prove central to my argument. We can come to it by way of Ullmann's observation of the "stark contrast" in the Middle Ages and then beyond of "two contrasting themes which portray the creation of law." With "the one called the ascending theme of government and law, . . . [i]ts main point is that law-creative power is located in the people itself"; the one "[o]pposed to this ascending theme is the descending one according to which original power is located not in the broad base of the people but in an otherworldly being, in divinity itself." Here "the office holders are not representatives: they are only delegates of the supreme Ruler."²³ In *On Civil Power*, Vitoria incorporates both of these "themes" through the mediation of God.²⁴ The "commonwealth" formed from "the multitude," or the people, "has power by divine law," together with representatives "who take upon themselves the responsibilities of the commonwealth."²⁵ The monarch acts thus for the commonwealth since "[t]he commonwealth as such cannot frame laws, propose policies, judge disputes, punish transgressors, or generally impose its laws on the individual."²⁶ Yet, the monarchs also "*have their power by natural and divine law, not from the commonwealth or from men.*"²⁷

From a temporally encompassing perspective, both sources of power operate within a "self-sufficient," "perfect community":

22. Banking on my precautionary saving of other histories near the outset, and by way of supporting this culmination of the story so far, Schmitt in *Der Nomos* moves beyond Vitoria as the expressive apotheosis of the law of the *Repubblica Christiana* by noting its supercession in the *ius publicum Europaeum*, a law based solely on secularizing European states. Theologians are thence told to depart the scene. As Schmitt sees the resulting situation, the acolytes of the new order offer no cohering basis for it, and he would make good this deficiency by showing how that order subsists on what can only be a sacral ground, somewhat literally: a *nomos* of the earth. This *nomos* entails two marvellous consequences. One is the combining of "concrete order" with "orientations" beyond any given or contained order. The other marvellous consequence is the ability of this *nomos* to provide a singular ground, a world-ground, generated in the imperial "land-appropriation of a new world" of the Americas, a ground for a "European international law" made up of state entities that are completely distinct yet related to each other in somehow sustaining this ground of their being with each other. See CARL SCHMITT, *THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF THE JUS PUBLICUM EUROPAEUM* 16, 69, 70, 82–83, 121, 127, 135 (G. L. Ulmen trans., Telos Press 2003) (1950).

23. WALTER ULLMANN, *LAW AND POLITICS IN THE MIDDLE AGES: AN INTRODUCTION TO THE SOURCES OF MEDIEVAL POLITICAL IDEAS* 30–31, 63 (Cornell Univ. Press 1975).

24. VITORIA, *On Civil Power*, in *POLITICAL WRITINGS*, *supra* note 10, at 12, 14.

25. *Id.* at 14.

26. *Id.*

27. *Id.* This entails something of a division of powers and functions between these sources: see the, as ever, nuanced account in Pagden & Lawrance, *Introduction* to VITORIA, *POLITICAL WRITINGS*, *supra* note 10, at xvii–xx (his emphasis).

What is a 'perfect' community? Let us begin by noting that a 'perfect' thing is one in which nothing is lacking, just as an 'imperfect' thing is one in which something is lacking: 'perfect' means, then, 'complete in itself' (*quod totum est, perfectum quid*). A perfect community or commonwealth is therefore one which is complete in itself; that is, one which is not part of another commonwealth, but has its own laws, its own independent policy, and its own magistrates.²⁸

In this way Vitoria aptly and pointedly accommodated the already formed or forming "sovereign" states of Europe that were, in varying ways, subordinating the so-called spiritual power of the papacy and the Holy Roman Empire to their own "temporal" claims on power and authority.

These various components of Vitoria's template for modern legal and political formation will be emphasized as we explore other historicities, but there is one final component understandably not developed by Vitoria which was to assume a pivotal significance: the component of nature as found, for example, in natural law. The almost pervasive story here is that the Aristotelian and Thomist constrictions on what can be generatively conceived of as nature, their mantric affirmations of a deracinated "authority," give way to an open and dynamic science of nature based on the perception of natural phenomena. There is some continuity of belief in God's sovereignty over or identification with nature, but this is now the notorious "God of the gaps," a god who retained independent significance only to the ever decreasing extent that science does not account for natural phenomena. The "domain assumption" of this science is that it can substitute for the deity without claiming transcendence because it is purely demonstrative.²⁹ Yet there is a transcendent belief in this very claim to the demonstrable, a claim not just to what is but also to what so far is not and will or may yet be. Both the claim and the unitary constitution of this nature are an inheritance of monotheism. And its incipient effect on law is to propel "law" into a more constricted deontology.

III. REVOLUTION

Starting with the first revolution in my next slice of historicity, one extending over the seventeenth and eighteenth centuries, the English revolution destroys the connection between monarch and the divine, but does so by way of destroying the monarch rather than the connection

28. VITORIA, *On the Law of War*, in *POLITICAL WRITINGS*, *supra* note 10, at 301.

29. The phrase "domain assumption" comes from ALVIN W. GOULDNER, *THE COMING CRISIS OF WESTERN SOCIOLOGY* 31 (Heinemann 1971).

explicitly. Despite the gradualist gloss given to it in most historical accounts, this was a revolutionary rupture that soon saw the end of monarchical rule. The incipiently modernist apostle of that revolution, and my next epochal thinker, is Thomas Hobbes.

To many these could be puzzling accolades. Hobbes, after all, was concerned to affirm effective order and stable authority after one of the most uncivil of civil wars. Thence, and going for now with the grain of conventional scholarship, Hobbes takes us to a state of nature demonstratively posited in which the “life of man” is “solitary, poor, nasty, brutish and short”; a state in which “our natural passions” put us in opposition to each other in “a war as is of every man against every man.”³⁰ So wholly is this the case that we must perforce transfer “all power and strength” to a sovereign Leviathan to whom I “give up my right of governing myself,” and to whom the subject is committed in all actions of Leviathan “as if they were his own”; subjects are thus inextricably bound to Leviathan, a sovereign “that beareth their person”—“none of his subjects . . . can be freed from his subjection.”³¹ Anything less than this total commitment to Leviathan leaves scope for our recusant natural passions and for a reversion to the lawlessness of the savage state, “to the confusion of a disunited multitude.”³² Thence, it must be that “when the people claimeth anything otherwise than by the voice of the sovereign power, it is not the claim of the people,” but rather, only the claim of “those particular men” making it.³³

Understandably enough, to have such a complete and continuing sway this “great Leviathan” would have to be conceived of as a “mortal god.”³⁴ Like any competent monotheistic deity, this god would marvelously have to combine being determinate with an unconstrained efficacy. Unlike the “immortal God,” however, the sovereign Leviathan has to do this without recourse to a transcendental reference fusing these contrary dimensions of its being. Hobbes offers no resolved way in which the being-in-the world of this mortal god could be constitutively comprehended. He does offer a seeming alternative in that, cling as we must to this mortal God, we remain “under the immortal God.”³⁵ This

30. THOMAS HOBBS, *LEVIATHAN* 85, 87 (Encyclopedia Britannica Educ. Corp. 1952) (1651) (chs. 13 & 14). Even if one accepts Macpherson’s designating the state of nature as “hypothetical” (which my reading of Hobbes does not), that would not be incompatible with the “scientific” quality of its observation. C. B. Macpherson, *Introduction to THOMAS HOBBS, LEVIATHAN* 40 (Penguin Books 1985) (1651).

31. *Id.* at 100–01 (chs. 17 & 18).

32. *Id.* at 101 (ch. 18).

33. THOMAS HOBBS, *THE ELEMENTS OF LAW, NATURAL AND POLITICAL* 119 (Kessinger Publ’g 2004) (1640) (ch. 27, ¶ 9).

34. HOBBS, *LEVIATHAN*, *supra* note 30, at 100 (ch. 17).

35. *Id.*

subjection, however, hardly challenges the pervasive supremacy of the mortal God. Such supremacy would only enable the subject to disobey a sovereign denial of the Christian faith or of the lordship of Christ; otherwise and unreservedly God “speaketh by his vice-gods or lieutenants here on earth,” by those who have sovereign power.³⁶ Nor, as was possible with the scholastic schema, can some resolving supremacy be found in law. Law, rather, is constituted as the “command” of the sovereign Leviathan “addressed to one . . . obliged to obey him,” the sovereign being “the sole legislator,” the “common power” necessary for there to be law.³⁷

In a work that will, or should, transform the study of Hobbes, James Martel has revealed a very different *Leviathan*, one in which a people can be together and generate authority in “horizontal” relations, as opposed to the vertical subjugation to Leviathan.³⁸ This comes about in two linked ways. With one, in our creative ability of reading, Hobbes finds a generative capacity transposed to political formation.³⁹ With the other, Martel “takes seriously” Hobbes’s engagement with religion and scriptural interpretation and in so doing he finds that for the Hobbes of *Leviathan* we exist in an “in-between time”: a time between what was once and will again be rule by God, but a time in which for now we as a people are left to our own devices even as we are impelled in the realization of our being together by the “pure and empty hypostatization” that is the Holy Spirit.⁴⁰

As well as this sacral infusion, there are other forces formative of a people, and these often connect to and qualify the power of the sovereign Leviathan. For a start, in a certain literal sense, the sovereign is the creation of people covenanting with each other. That entails something of a threshold problem in that for Hobbes, “when there is no civil power erected over the parties promising . . . such promises are no covenants”: “[T]he validity of covenants begins . . . with the constitution of a civil power sufficient to compel men to keep them.”⁴¹ Clearly an exception has to be found, and Hobbes also affirms that “covenant[s] entered into by fear, in the condition of mere nature, are obligatory.”⁴² Despite this

36. HOBBS, ELEMENTS, *supra* note 33, at 101, 114–15 (ch. 25, ¶ 5; ch. 26, ¶¶ 10–11). The “ascending” thrust of this is qualified later.

37. HOBBS, LEVIATHAN, *supra* note 30, at 88, 130 (chs. 15 & 26).

38. JAMES R. MARTEL, SUBVERTING THE LEVIATHAN: READING THOMAS HOBBS AS A RADICAL DEMOCRAT 135 (Columbia Univ. Press 2007).

39. *Id.* at ch. 2.

40. *Id.* at 102, 184. All of which does infinitely less than justice to the nuance of Martel’s “reading.”

41. HOBBS, LEVIATHAN, *supra* note 30, at 91 (ch. 15).

42. *Id.* at 89 (ch. 14). Hobbes was often to counter, for the state of nature, the argument that a covenant entered into out of fear was not valid: “for then it would follow that those promises which

compelling element and the dismal condition of the state of nature, Hobbes does recognise that some restraints and normative cohesion do exist in the state of nature.⁴³ Then, nature also comes with an abundance of “natural laws,” “the first and fundamental of which is: *to seek peace and follow it.*”⁴⁴ Hobbes’s fifth natural law would impel “*every man [to] strive to accommodate himself to the rest,*” an imperative founded “in man’s aptness to society.”⁴⁵ In the same vein, and even more pointedly, “reason suggesteth convenient articles of peace upon which men may be drawn to agreement. These articles are they which otherwise are called the *laws of nature.*”⁴⁶ Furthermore, we find that justice itself is an “inclination of nature.”⁴⁷ Above all, in another resort to literal sense, the natural law “is also wont to be called Divine,” a law “given by God to every man for the rule of his actions.”⁴⁸

As one would expect from such a substantial people and “man,” they are not simply supine before an all-demanding Leviathan. The same law of nature impelling men to enter into the primal covenant by which they created Leviathan does not “command any divesting of other rights, than those only which cannot be retained without the loss of peace,” and indeed, “many rights are retained, when we enter into peace one with another.”⁴⁹ Hobbes also propounds an extensive list of “liberties” secured to the subject of Leviathan.⁵⁰ What is more, Leviathan remains bound by the primal terms of the covenant and thence cannot act in a way contrary to the preservation and protection of the life of its subjects.⁵¹ More expansively, Hobbes finds that “the duty of the sovereign consisteth in the good government of the people,” something which involves securing “the safety of the people,” and “by *safety* here is not meant a bare preservation, but also all the contentments of life which every man by lawful industry, without danger or hurt to the commonwealth, shall acquire to himself.”⁵² Leviathan is thence set about by the

reduc’d men to civill life, and by which Lawes were made, might likewise be of none effect.” THOMAS HOBBS, *DE CIVE* 25 (Kessinger Publ’g 2004) (1642) (ch. 2, ¶ XVI).

43. HOBBS, *LEVIATHAN*, *supra* note 30, at 90, 99 (chs. 14, 17).

44. *Id.* at 86 (ch. 14). And for the abundance, see *id.* (chs. 14, 15 generally). Here there is now the indispensable SAMANTHA FROST, *LESSONS FROM A MATERIALIST THINKER: HOBBSIAN REFLECTIONS ON ETHICS AND POLITICS* 116–25 (Stanford Univ. Press 2008).

45. HOBBS, *LEVIATHAN*, *supra* note 30, at 93 (ch. 15) (his emphasis).

46. *Id.* at 86 (ch. 13) (his emphasis).

47. HOBBS, *ELEMENTS*, *supra* note 33, at 58 (ch. 16, ¶ 4).

48. HOBBS, *DE CIVE*, *supra* note 42, at 41 (ch. 4, pt. I); see also HOBBS, *ELEMENTS*, *supra* note 33, at ch. 18.

49. HOBBS, *ELEMENTS*, *supra* note 33, at 61 (ch. 17, ¶ 2).

50. HOBBS, *LEVIATHAN*, *supra* note 30, at ch. 20.

51. *Id.* at 115 (ch. 21).

52. HOBBS, *ELEMENTS*, *supra* note 33, at 122 (ch. 28, ¶ 1); HOBBS, *LEVIATHAN*, *supra* note 30, at 153 (ch. 30) (his emphasis).

most extensive “duties,” as well as practical dictates of rule and pedagogic responsibilities, all for ensuring the well-being and improvement of the people.⁵³

And so also with law, one finds the like restraints and constituent effects on the sovereign. Although, as we saw, law is the command of the sovereign, not only are there intrinsic qualities of law to which the sovereign must conform, but laws also depend on their reception by his subjects, depend on their knowing the law and on their interpretation of it.⁵⁴ And in the *Dialogue* between the lawyer and the philosopher, the philosopher, who is of course always right, proffers the hard-headed view that it is “in their own interest” for Kings “to make Laws as the people can endure, and may keep them without impatience, and live in strength and courage to defend their King and Countrey.”⁵⁵ Most remarkably, perhaps, the very laws made by Leviathan, the civil laws, are found in a sense to bind Leviathan, for just as men have been able to create a sovereign Leviathan, “so also have they made artificial chains, called *civil laws*, which they themselves, by mutual covenants, have fastened at one end to the lips of that man, or assembly, to whom they have given the sovereign power, and at the other end to their own ears.”⁵⁶

In all, whilst Hobbes’s scheme reflects the Vitorian template remarkably, especially so given Hobbes’s opposition to scholasticism, it also departs from that template in its proto-modernity. Hobbes is not infrequently seen as providing an origin myth of modern political and legal formation.⁵⁷ Like all good myths of origin, Hobbes’s speaks not just to what we were but to what we are now. And like all good myths of origin, the one Hobbes gives us embeds the insuperable yet constituent contradictions of our being-together. Generically, the myth will usually “resolve” the contradiction by some reference to or intervention from beyond, a reference or intervention that combines a sacred and enacts a transcendent with a profane actuality. More pointedly, the question of the origin figures the condition of our being-together, a condition that must combine the infinite possibility of being (what is before the origin) with its existent determinacy (what is originated). One combining was instanced by Vitoria in the reference to a monotheistic deity, fusing these

53. HOBBS, *LEVIATHAN*, *supra* note 30, at ch. 30.

54. *Id.* at 134, 139, 156–57 (chs. 26, 27, & 30).

55. THOMAS HOBBS, *A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND* 166, 204 (The Univ. of Chicago Press 1971) (1681).

56. HOBBS, *LEVIATHAN*, *supra* note 30, at 113 (ch. 21) (his emphasis). The binding of Leviathan here is reinforced in the obvious reference to and contrast with *Job* 41:1, 3, 5. See also HOBBS, *LEVIATHAN*, *supra* note 30, at 148 (chs. 28–31).

57. For a recent instance, see J. M. COETZEE, *DIARY OF A BAD YEAR* 3–4 (Harvill Secker 2007).

dimensions of being in and as itself. Hobbes, the modernist, eschews that resort and resituates the deity by way of advancing two other combinatory forces also found in the Vitorian template—law and the people.

Somewhat like Vitoria, the worlded deity of Hobbes endows a people by way of natural law and the Holy Spirit. This process intermingles with the force of a “nature” scientifically asserted. Natural propensities are formative also of Leviathan, but here the worlding of the deity proceeds to the point of near-effective rupture with the transcendent. Leviathan is a “mortal god” whose subordination “under the immortal God” is reduced to near-insignificance.⁵⁸ In the very comparison of the human creation of Leviathan with “that *fiat*, or the *Let us make man*, pronounced by God in the Creation,” Leviathan is confirmed as being of the world, “that great LEVIATHAN called a COMMONWEALTH, or STATE (in Latin CIVITAS), which is but an artificial man, though of greater stature and strength than the natural.”⁵⁹

So, going back to the beginning of our conversation with Hobbes, whilst in *Leviathan* he was concerned with the affirmation of stable rule and persistent order, it was not the old rule or the old order. As his contemporaries appreciated, Hobbes was putting in place a new foundation for order, one in which the monarch played no necessary part and one in which a transcendent reference by way of “divine right” had no place, “[f]or God made Kings for the People, and not People for the Kings.”⁶⁰ What, as it were, takes the cohering place of a divinity now divided, and as we saw, is an imbrication of law and the people.

There is much revolutionary refinement of this outcome in the eighteenth century, and here the inescapable apostle, or perhaps even prophet, is Rousseau. For Rousseau, there was something close to fusion between law and the people. Law was the way in which the people became and remained a people, became a determinate people whilst preserving the freedom of the people; and law was, furthermore, the way in which the people operatively became sovereign.⁶¹ Laws, for Rousseau, “are really *nothing other* than the conditions on which civil society exists.”⁶² We can discern this primal quality of law, and its quality as “nothing other,” by remarking how law navigates the famed, the “original” conun-

58. HOBBS, *LEVIATHAN*, *supra* note 30, at 100 (ch. 17).

59. *Id.* at 47 (his emphasis).

60. HOBBS, *DIALOGUE*, *supra* note 55, at 61 [15]. And for the general point, see JEFFREY R. COLLINS, *THE ALLEGIANCE OF THOMAS HOBBS* (Oxford Univ. Press 2005).

61. JEAN-JACQUES ROUSSEAU, *A Discourse on Political Economy*, in *THE SOCIAL CONTRACT AND DISCOURSES* 135–36 (J. H. Brumfit & John C. Hall eds., G. D. H. Cole trans., J. M. Dent 1986) (1755).

62. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 83 (Maurice Cranston trans., Penguin Books 1968) (1762) (bk. II, ch. 6).

drum Rousseau extracts from the social contract: for a “people” to be “formed . . . the effect would have to become the cause; the social spirit which must be the product of social institutions would have to preside over the setting up of those institutions; men would have to have already become before the advent of law that which they become as a result of law.”⁶³ Rousseau’s own myth of origin cannot avoid this seeming impasse by resort to Hobbes’s method, one quite common to the genre: that is, the method of emplacing the originated before the origin. Rousseau’s state of nature was peopled, more typically of his time, by the solitary savage.⁶⁴ Rousseau’s resort here involves a deity as aptly mysterious as the monotheistic God of revelation. “Gods,” announces Rousseau, gods plural, “would be needed to give men laws.”⁶⁵ In a more revealing vein, Rousseau finds that for laws to be effective and lasting they had to come from a quasi-divine lawgiver possessed of an entirely disinterested “great soul,” a lawgiver always selflessly attuned to possibility and able “to make the Gods speak.”⁶⁶ Yet, even though the lawgiver’s “task . . . is beyond human powers,” it is a task the achievement of which Rousseau sees as necessary in the world.⁶⁷ It is a task which Rousseau configures to the qualities of the lawgiver. In bestowing the laws of the constitution, the lawgiver has to create a social bond that integrates individuals into it, a bond believed in by those individuals, and one that is lasting. To perform these tasks, the god-like lawgiver has to be quite apart from the nation being so endowed, and has to be lacking in any authority, right, force or interest to create the laws. Not only is the law so given incapable of being encompassed by the determinate national sovereign, but for good measure the only way in which the sovereign can act is “to make laws,” even though, for Rousseau, “the sovereign power” is wholly “absolute,” “sacred,” and wholly “inviolable.”⁶⁸ Rousseau would go so far as to equate departure from the “voice” of law “alone” with a return to the divisive and “pure state of nature.”⁶⁹ Although Rousseau does not go so far as to connect the two, he does provide the means for complementing the unconditional quasi-deific lawgiver with another law—the emplaced, the determinate law. The imperative unconditionality that accompanies the giving of the law can be matched by a determinacy necessary for the receiving of it, and Rousseau provides a list of attributes

63. *Id.* at 86–87 (bk. II, ch. 7).

64. See generally ROUSSEAU, *A Discourse on the Origin of Inequality*, in THE SOCIAL CONTRACT AND DISCOURSES, *supra* note 61.

65. ROUSSEAU, SOCIAL CONTRACT, *supra* note 62, at 84 (bk. II, ch. 7).

66. *Id.* at 87 (bk. II, ch. 7).

67. *Id.* at 86 (bk. II, ch. 7).

68. *Id.* at bk. III, chs. 4, 6.

69. ROUSSEAU, *A Discourse on Political Economy*, *supra* note 61, at 136.

needed for a people to be “fit to receive laws,” attributes which amount to a determinate autarchy.⁷⁰

Thus far, Rousseau’s resort to the deific could be seen as one of the more intriguing of Enlightenment findings that the political as “secular” can exist only “as if” suscitated by some deity or sacred law.⁷¹ Yet, even that did not exhaust Rousseau’s inventiveness on this score, for there is also his elevation of a “civil religion” that binds citizens to the state.⁷² The most remarkable thing about this religion is that it affirms the existence of God who is seemingly the Christian God yet is nonetheless to be conceived of as completely effective in the world.⁷³ So, the first dogma of such religion is “the existence of . . . [this] omnipotent intelligent, benevolent divinity,” but to see this divinity in “theocratic” terms would, for Rousseau, be “pernicious.”⁷⁴ Rather, the “dogmas” are laid down by the sovereign and then not “strictly as religious dogmas” but as the substance of “a profession of faith which is purely civil,” a profession “without which it is impossible to be either a good citizen or a loyal subject,” all of which for Rousseau does not involve “any question of theology.”⁷⁵ So, as well as faith in a divinity, the remaining dogmas would require the citizen to believe in “the life to come; the happiness of the just; the punishment of sinners; the sanctity of the social contract and the law.”⁷⁶ That is a list in which, operatively, the last shall be first, since for Rousseau, to repeat, “[L]aws are really nothing other than the conditions on which civil society exists.”⁷⁷

There remains a revolution the absence of which so far is starting to feel rather pressing, not least because it provides something of an apotheosis of the configuration of divinity, law and the people, and as such it

70. ROUSSEAU, *THE SOCIAL CONTRACT*, *supra* note 62, at 95 (bk. II, ch. 10).

71. This particular “as if” comes from Kant in the following exemption from the imperative *sapere aude*:

A law that is so holy (inviolable) that it is already a crime even to call it in doubt *in a practical way*, and so to suspend its effect for a moment, is thought as if it must have arisen not from human beings but from some highest, flawless lawgiver; and that is what the saying ‘All authority is from God’ means. This saying is not an assertion about the *historical basis* of the civil constitution; it instead sets forth an idea as a practical principle of reason; the principle that the presently existing legislative authority ought to be obeyed, whatever its origin.

IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 95 (Mary Gregor trans., Cambridge Univ. Press 1996) (1797) [6:319] (his emphasis).

72. See ROUSSEAU, *THE SOCIAL CONTRACT*, *supra* note 62, at 185 (bk. IV, ch. 8).

73. See JEAN-JACQUES ROUSSEAU, *ÉMILE* 274–332 (Barbara Foxley trans., J. M. Dent 1993) (1762).

74. ROUSSEAU, *THE SOCIAL CONTRACT*, *supra* note 62, at 187 (bk. IV, ch. 8).

75. *Id.* at 186 (bk. IV, ch. 8).

76. *Id.*

77. *Id.* at 83 (bk. II, ch. 6).

comes to provide the exemplary instance of civil religion.⁷⁸ The contribution of that revolution can be carried by a certain Declaration made “in the Name and by the authority of the good People of these Colonies,” and made by their “Representatives of the United States of America.” The originality, the newness, of creation by a people in terms of the Declaration is not to deny that there were continuities of a kind, inevitably.⁷⁹ Nonetheless, here we have the first invented nation, one that is “declared” into being in the rejection of what came before and in the generative affirmation of what is “institute[d]” as “new Government,” an affirmation that comes from “the Right of the People,” that same “good People” in whose “Name” and by whose “Authority” the constituent “Declaration” is made. We come immediately to Rousseau’s classic conundrum: “the people” generating the Declaration are declared into existence by the Declaration—all in a feat of what Derrida would call “fabulous retroactivity.”⁸⁰

What is thus declared into existence is an amply acknowledged endowment of God. There would seem to be two gods involved here, or the two dimensions of Christian monotheism already encountered. One involves “the Laws of Nature and of Nature’s God,” which laws “entitle” a people to a “separate and equal station.” This would seem to be the god of deism, a god of nature whose constituent laws are enduringly determinate and knowable as such. It would seem to be the same god invoked as a “Creator” that endows people with “Rights” that impel them to form “Government” so as to secure these rights. When it comes to the formative and performative declaration itself, however, a more evident theism is invoked. This resort is to “the Supreme Judge of the world” who is appealed to “for the rectitude of our intentions,” the intentions of “the Representatives” who “declare, that These United Colonies are, and of Right ought to be Free and Independent States.” Judging and being the store of rectitude require qualities akin to those of the other god of monotheism, the god of revelation and nature confounded, a god of alterity, a god ranging beyond any determinate order. When these dimensions of the deity are combined, they match a people that can assume a conditioned, a determinate and delimited presence, yet with their “Au-

78. As to the latter, see especially ROBERT N. BELLAH, *Civil Religion in America*, in *AMERICAN CIVIL RELIGION* (Russell E. Richey & Donald G. Jones eds., Harper & Row 1974) (1967).

79. The signatories to the Declaration could be seen “as defenders of a history accomplished” rather than producers of a “sudden” or “extraordinary birth outside the processes of time.” GARRY WILLS, *INVENTING AMERICA: JEFFERSON’S DECLARATION OF INDEPENDENCE* 38 (The Athlone Press 1978) (vii,xix).

80. JACQUE DERRIDA, *Declarations of Independence*, in *NEGOTIATIONS: INTERVENTIONS AND INTERVIEWS, 1971-2001* 50 (Elizabeth Rottenberg trans., Stanford Univ. Press 2002) (1976).

thority” and “Right” can also and continuously be unconditional and il-limitably generative.

At this stage, the inevitable invocation of de Tocqueville comes into play, and it does so not so much for the customary references to the religiosity of “America” and the pervasive force of its law,⁸¹ but more because of a combining of these two qualities. In seeking “to characterize Anglo-American civilization,” he finds it to be “the result . . . of two quite distinct ingredients . . . which Americans have succeeded somehow to meld together in wondrous harmony; namely the *spirit of religion* and the *spirit of liberty*.”⁸² The content of religion, he finds, is the object of invariant devotion, whereas with the spirit of liberty,

political principles, laws, and human institutions appear flexible and can be shaped at will into any combination. Before their advance, the barriers which imprisoned the society into which they were born were lowered; old opinions which for centuries had governed the world, melted away. An almost limitless path, a field without horizon opened before them; the human spirit rushes forward to travel these places.⁸³

The rush of spirit stops short, however, “at the limits of the political world,” beyond which limits the enduring content of religion supervenes, a religion that is “the guardian of morality,” of “the moral world,” a world in which “everything is classified, systematized, anticipated, and decided beforehand,” and that morality in turn is “the guarantee of law.”⁸⁴ “Far from harming each other,” de Tocqueville writes, “these two inclinations, despite their apparent opposition, seem to walk in mutual agreement and support.”⁸⁵ And, it could be emphasized, law is the only entity inhabiting both inclinations, the “almost limitless path, a field without horizon” and the calculable solidity of “the moral world.”

IV. MODERNISM

The broadcasting of God’s death by one of Nietzsche’s seers, “the madman” of *The Gay Science*, was soon followed by this pronouncement of another, Zarathustra: “[D]ead are all gods.”⁸⁶ For the sake of com-

81. *E.g.*, ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 206 (Gerald E. Bevan trans., Penguin Books 2003) (1835) (pt. 2, ch. 2 & pt. 1, ch. 6).

82. *Id.* at 55 (pt. 1, ch. 2) (his emphasis).

83. *Id.*

84. *Id.* at 55–56 (pt. 1, ch. 2).

85. *Id.*

86. FRIEDRICH NIETZSCHE, *THUS SPOKE ZARATHUSTRA* 59 (Adrian Del Caro & Robert B. Pippin eds., Adrian del Caro trans., Cambridge Univ. Press 2006) (1883–1885) (*On the Bestowing Virtue*, § 3); FRIEDRICH NIETZSCHE, *THE GAY SCIENCE* 119–20 (Bernard Williams ed., Josefine Nauckhoff trans., Cambridge Univ. Press 2001) (1882) (§ 125).

pleteness, Blanchot would add that here “God means God, but also everything that in rapid succession, has sought to take his place.”⁸⁷ All of which can become, however, the chronicle of a death postponed. Starting with that most religious of irreligious tracts, *Thus Spoke Zarathustra*, we find a significant successor, the “new idol” that is the state—the state arrogating “the ordaining finger of God,” the clear reference being to Moses bringing down to the world the tablets “written with the finger of God.”⁸⁸ The ever-immediate problem for any entity of the world that would seek to take over “the ordaining finger of God” is that entity’s inescapable determinacy. Whilst the state’s incipient arrogation of all that could be ramps this new idol up to a transcendent status, there is no transcendence for it to occupy, as it were. Such putative endowing of a determinacy creates a terminal entity. So, for Zarathustra, “the sign of the state . . . signifies the will to death.”⁸⁹ There is more in that vein, but one poignant rendition will suffice here, the one in which the state is described as “a death-horse clattering in the regalia of divine honors.”⁹⁰ The other marked character of this state is that “[e]verything about it is false”;⁹¹ and “whatever it may tell you, it lies.”⁹² A determinacy constituted or “telling” in terms of an illimitable efficacy cannot help but be false.

Returning to the hardly less heady reaches of *The Gay Science*, Nietzsche unleashes two visions consequent on the death of God. The first vision comes with the “collapse” that ensues from the loss of “this faith,” and it forebodes for “the next century” a “deep darkness”—“the shadows that must soon envelop Europe.”⁹³ That could be read as one of several instances of Nietzsche’s percipience of disasters to come, including totalitarian comprehensions.⁹⁴ Whilst the totalitarian state has as its truth, “the truth of death,” and thence cannot endure in its appropriation of “life” within an enduring determinacy,⁹⁵ even with the state’s claiming “at any one time” to hold “life” in enduringly determinate part, there is

87. MAURICE BLANCHOT, *THE INFINITE CONVERSATION* 144 (Susan Hanson trans., Univ. of Minn. Press 1993) (1969).

88. See *Exodus* 31:18; *Deuteronomy* 9:10.

89. NIETZSCHE, *THUS SPOKE ZARATHUSTRA*, *supra* note 86, at 35 (*On the New Idol*).

90. *Id.*

91. *Id.*

92. *Id.* at 34 (*On the New Idol*).

93. NIETZSCHE, *THE GAY SCIENCE*, *supra* note 86, at 199 (¶ 343).

94. See also, e.g., FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALS*, *supra* note 8, at 134–35 (Third Essay, § 27).

95. See JEAN-LUC NANCY, *THE INOPERATIVE COMMUNITY* 12 (Peter Connor, Lisa Garbus, Michael Holland, & Simona Sawhney eds., Peter Connor trans., Univ. of Minn. Press 1991) (1983); and NIETZSCHE, *THUS SPOKE ZARATHUSTRA*, *supra* note 86, at 35 (*On the New Idol*).

still a total comprehending entailed in securing the part both itself and in it in relation to everything that would ever come to it.⁹⁶

From this first dark vision Nietzsche proceeds seamlessly to the exaltation of a second vision, a vision of light, a vision of “a new dawn” in which “our heart overflows with gratitude, amazement, forebodings, expectation.”⁹⁷ This is a vision rendered in imagery that had already radiated throughout *Zarathustra*,⁹⁸ images such as the “clear . . . horizon,” the “open sea.”⁹⁹ These, in terms of *Zarathustra*, are images of “overcoming” the oppressively existent—an overcoming not in terms of a messianism disconnected from the existent, but one which is “bridged” from the present condition, a condition inclusive of the “new idol” of the state, and an overcoming that is the outcome of a long development.¹⁰⁰ Put in the context of these two contrary visions, what this amounts to is a connection between them in which the time of the first is overcome in the world. Transposed to the now-defunct deity, the two visions can be seen as corresponding to the constituent dimensions of monotheism, the dimensions of perfect determinacy and perfect ever-surpassing; but with the transcendent capacity to combine these dimensions gone, they are, short of the overcoming, divided in the world.

If we are not to be consigned either to the terminal stasis of the first dimension or to the infinite irresolution of the second, there must be some way of bringing these dimensions together in the world. Nietzsche laid out a means that could do this, and that means was law. His conception of law is more usually associated with the first dimension, most dramatically in the elevation of creativity as a breaking of the “old tablets” of the law—the creator as “lawbreaker.”¹⁰¹ Yet a constant creativity requires also the breaking of any “new tablet.”¹⁰² And we find that there are various creative types of a rather assertive kind, philosophers whose “creating is a law-giving,” a legislating, and this would import not only that law was their instrument but also that it was integral to the creation

96. Cf. JACQUES DERRIDA, *SPURS: NIETZSCHE'S STYLES* 125 (Barbara Harlow trans., Univ. of Chicago Press 1979).

97. NIETZSCHE, *THE GAY SCIENCE*, *supra* note 86, at 199 (¶ 343).

98. The relevant part of *THE GAY SCIENCE*, Book Five, was added after the publication of *THUS SPOKE ZARATHUSTRA*.

99. NIETZSCHE, *THE GAY SCIENCE*, *supra* note 86, at 199 (¶ 343).

100. See generally NIETZSCHE, *THUS SPOKE ZARATHUSTRA*, *supra* note 86, at 36 (*On the New Idol*), 56, 58 (*On the Bestowing Virtue*), 65 (*On the Blessed Isles*), and 110 (*On Redemption*). And as for development specifically, see e.g., NIETZSCHE, *GENEALOGY OF MORALS*, *supra* note 8, at 134–35 (Third Essay, § 27).

101. NIETZSCHE, *THUS SPOKE ZARATHUSTRA*, *supra* note 86, at 164, 171 (*On Old and New Tablets*, §§ 15, 26).

102. *Id.* at 165 (*On Old and New Tablets*, § 16).

itself.¹⁰³ Furthermore, Nietzsche's writing on art would take the relation between creation and law more distinctly into the second dimension. To draw on Heidegger's admirably pointed rendition:

Art is not only subject to rules, must not only obey laws, but is in itself legislation. Only as legislation is it truly art. What is inexhaustible, what is to be created, is the law. Art that dissolves style in mere ebullition of feelings misses the mark, in that its discovery of law is essentially disturbed; such discovery can become actual in art only when the law drapes itself in freedom of form, in order in that way to come openly into play.¹⁰⁴

Whilst it is dangerous to say what Nietzsche did *not* do, it seems we should now resort to the tradition of Nietzsche, broadly conceived, to find a more resolute combining of the two dimensions in and as law.¹⁰⁵ This is a law, Blanchot tells us, that "affirms itself as law . . . without reference to anything higher: to it alone, pure transcendence."¹⁰⁶ Although it masquerades as mundane, this is law as the neo-sacral, the law that has always to come from beyond, self-separating from that beyond, a separation, according to Blanchot again, "that institutes it as form, in the very movement by which it formulates this exteriority as law."¹⁰⁷ This, of course, and insisting on the mundane, seems counter to law as the rule of law, as the guarantee of some determinate order. Yet, for law to rule it must be of the beyond, capable of a complete responsiveness to alterity, otherwise it would cease to rule what is and will be an ever-changing world around it. In this ultimacy of responsive rule, and in a seeming paradox, law becomes a vacuity. Law must, says Derrida, "be without history, genesis, or any possible derivation."¹⁰⁸ Law, then, is left with no enduring content of its own. It always depends for its very content and for much of its force on some power apart from itself. "Law itself," says Nancy, "does not have a form for what would need to be its own sover-

103. FRIEDRICH NIETZSCHE, *BEYOND GOOD AND EVIL* 83 (Helen Zimmern trans., Dover Publ'ns 1997) (1886) (¶ 211). Nietzsche's anthropology of law in the Second Essay of NIETZSCHE, *GENEALOGY OF MORALS*, although concerned with the emergence of the calculable as and in law, is also a story of a creative going beyond difference stages of legal formation. See, e.g., NIETZSCHE, *ON THE GENEALOGY OF MORALS*, *supra* note 8, at 55–57 (Second Essay, § 11).

104. I MARTIN HEIDEGGER, *NIETZSCHE VOLUMES I AND II: THE WILL TO POWER AS ART AND THE ETERNAL RECURRENCE OF THE SAME* 130–31 (David Farrell Krell trans., HarperOne 1991).

105. Most notably perhaps in JACQUES DERRIDA, *Force of Law: The 'Mystical Foundation of Authority'*, in *ACTS OF RELIGION* (Gil Anidjar ed., Mary Quaintance, trans., Routledge 2002).

106. MAURICE BLANCHOT, *THE STEP NOT BEYOND* 25 (Lycette Nelson trans., State Univ. of N.Y. Press 1992) (1973).

107. BLANCHOT, *THE INFINITE CONVERSATION*, *supra* note 87, at 434.

108. JACQUES DERRIDA, *Before the Law*, in *ACTS OF LITERATURE* 191 (Avital Ronell trans., Routledge 1992).

eignty.”¹⁰⁹ With occidental political formation, the paradigm of law is the law “of” the “sovereign” nation-state. Thence, law is a dependent creation of this particular “new idol,” this “theological phantasm.”¹¹⁰ Yet the opposite is “also” the case. The law is the vicarious carrier of the nation-state’s necessary receptivity to what could ever be. Should the enduringly determinate nation-state be so receptive in and as itself, it would deliquesce.

For Nietzsche, this quasi-deific division, that between the new idol and the “inexhaustible” law,¹¹¹ would still leave us uncomprehending the death of God, leave us with “the magnitude of the deed . . . too great for us.”¹¹² Hence, perhaps, law’s involving mystery.

109. JEAN-LUC NANCY, *BEING SINGULAR PLURAL* 131 (Robert D. Richardson & Anne E. O’Byrne trans., Stanford Univ. Press 2000) (1996).

110. Jacques Derrida, *A Discussion with Jacques Derrida*, 5 *THEORY AND EVENT* 49 (The Johns Hopkins Univ. Press 2001), available at http://muse.jhu.edu/journals/theory_and_event/v005/5.1derrida.html.

111. HEIDEGGER, *NIETZSCHE*, *supra* note 104, at 130.

112. NIETZSCHE, *THE GAY SCIENCE*, *supra* note 86, at 120 (§ 125).